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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-1652

RALPH KEMP, Warden,

Petitioner,

v.

WAYNE CARL COLEMAN,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether under the remarkable facts of this case, certiorari must be granted to review the Eleventh Circuit's decision granting Respondent a new trial, even though the overwhelming evidence in the record demonstrates that, in this capital case, Respondent had no chance of receiving a fair trial in a fair tribunal, due to the extensive and prejudicial publicity, which saturated the rural county of approximately seven thousand persons and predisposed the community to believe not only that Respondent was guilty but much more significantly that the death penatly was the only acceptable sentence.

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The Respondent, Wayne Carl Coleman, responds to the Attorney General of Georgia's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. Respondent maintains that the Court of Appeals reached the only result compatible with the Fourteenth Amendment's requirement that any criminal trial be fundamentally fair, In Re Murchison, 349 U.S. 133 (1955), and the Eighth Amendment's concern that any sentence of death "be, and appear to be, based on reason rather than caprice." Gardner v. Florida, 430 U.S. 349 (1977). In short, Respondent contends that in order for this Court to reach a result, contrary to that reached by the Eleventh Circuit, this Court will have to determine that a habeas corpus petitioner is, under no circumstances, entitled to federal habeas corpus relief due to a failure of the state trial court to grant a change of venue.

STATEMENT OF THE CASE

A. Procedural History

Respondent was convicted of six counts of murder and sentenced to death in January of 1974. His convictions and sentences of death were affirmed by the Georgia Supreme Court; this Court denied certiorari. Coleman v. State, 237 Ga. 84, 226 S.E.2d 911 (1976) (Hill, J. dissenting on the basis of pre-trial publicity), cert. denied, 431 U.S. 909 (1977), rhng. denied, 431 U.S. 961 (1977).

Respondent thereafter filed a state habeas corpus petition which was denied. The State Supreme Court denied the certificate of probable cause to appeal; this Court denied certiorari. Coleman v. Balkcom, 451 U.S. 949, rhng. denied, 452 U.S. 955 (1981). Thereafter, Respondent filed a federal habeas corpus petition in the United States District Court for the Middle District of Georgia. The Honorable J. Robert Elliott denied relief after the submission of briefs by both parties. A certificate of probable cause to appeal was granted. The United States Court of Appeals for the Eleventh Circuit remanded the case to the district court for an evidentiary hearing on the issue, inter alia, of the denial of Respondent's motion for a change of venue due to the extensive pre-trial publicity. Coleman v. Zant, 708 F.2d 541 (11th Cir. 1983). After extensive evidentiary hearings, Judge Elliott again denied relief.[1] On appeal, the Eleventh Circuit remanded the case to the district court with instructions to issue the writ of habeas corpus conditioned upon the state's right to retry Respondent. Coleman v. Kemp, 778 F.2d 1487 (1985). Rehearing and rehearing en banc was denied. Coleman v. Kemp, 782 F.2d 896 (11th Cir. 1986).

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1. The evidentiary hearing held in the district court was conducted at two different times: August 7 and November 5-8 (hereinafter Aug. Evid. Hrng. and Nov. Evid. Hrng).

B. Statement of Material Facts

The Eleventh Circuit painstakingly set forth the relevant facts mandating a finding that Respondent was denied his basic constitutional right to a fair trial by the trial court's failure to grant a change of venue. The truism, "the facts speak for themselves", has seldom been as appropriate as it is in this case. The Respondent cannot adequately summarize those facts (set out in 45 pages in the Court of Appeals opinion) in this pleading and would refer this Court to the panel's opinion. Among other relevant facts, the following facts are uncontroverted:

Respondent was indicted for the murders which ultimately led to his conviction and sentence of death along with three other persons. One of the co-indictees, Billy Isaacs, testified for the State in exchange for a favorable plea bargain. The other two co-indictees, Carl Isaacs and George Dungee, were tried, convicted and sentenced to death in separate trials which began on January 1, 1974, and January 7, 1974, respectively. Respondent Coleman's trial was the last of the three trials, beginning on January 14, 1974.

All three trials were conducted in Seminole County. The Isaacs and Dungee trials were concluded, and the verdicts of guilt and the death sentences imposed at each trial were widely publicized, prior to the jury selection in Wayne Carl Coleman's trial.

At the time of Respondent's trial, Seminole County was (and is) a small rural county in Southwest Georgia with a population of approximately 7,000 persons and 2,100 households.[2] The only town of any significant size in the county is Donalsonville, with a population of 2,500. Agriculture is the main industry. (T. Nov. Evid. Hrng. at 288-89). There is very little migration into Seminole County. During the 1950's, there was a large migration of young persons out of Seminole County, leaving an older population, largely local in orientation. Consequently, most residents of Seminole County have been there most or all of their lives. (Id. at 291-95). As a result of

2. The 1970 census indicated the county's population was 7,059 and that there were 2,117 households.

Seminole County's small, rural, self-contained nature, with only a single town of any significant size, its population is closely bound by ties of kinship and friendship, attending the same churches and schools, shopping in the same place, etc. (T. Nov. Evid. Hrng. at 296). It is also an area extremely unaccustomed to homicides; with the exception of the murders which resulted in Respondent's convictions and sentences of death, there were only thirteen unlawful homicides in the ten year period from 1968-1978. (T. Nov. Hrng. at 264-66).

Among the media to which residents of Seminole County had access were the Donalsonville News (the weekly local newspaper), the Albany Herald, the Dothan Eagle, the Bainbridge Post Searchlight, the Atlanta Constitution and the Atlanta Journal,[3] the Georgia Network News on radio, television stations from Tallahassee, Florida, Dothan, Alabama and Albany, Georgia and radio stations from Donalsonville, Albany, Dothan and Bainbridge. Contained in the Record in this case are the relevant articles from the print media and the transcript of the Georgia Network News radio broadcasts.

Due primarily to the passage of time, transcripts of the other radio and television broadcasts were not available; however, the media representatives who testified at the federal evidentiary hearing noted that the radio and television coverage was as extensive as the print media coverage. Thelma Harrington and Watson Lee, both life long residents of Seminole County, recalled extensive electronic media coverage. Also, the materials that the Associated Press and United Press International send out to their subscribing newspapers (such as the Atlanta Journal) is also sent out to their electronic subscribers, both radio and television. The AP and UPI stories are broadcast in a shortened, although substantively similar form, as that which appears in the print media. (T. Nov. Evid. Hrng. at 404-05; 503-06).

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3. In 1973-74, the circulation of the Donalsonville News in Seminole County was 1,800, the Albany Herald was 518, the Dothan Eagle, 315, the Atlanta Journal was 106 and the Atlanta Constitution was 178. The circulation of the Sunday Atlanta Journal and Constitution, in Seminole County was 563. (T. Nov. Evid. Hrng. at 409).

Simply stated, the killing of the six members of the Alday family, one of the (if not the) most prominent and respected family in Seminole County, was the most significant event in the history of Seminole County. At the evidentiary hearing, journalists who covered the event surrounding the Aldays' deaths and the trial of Respondent and his co-indictees, as well as long time residents of Seminole County testified concerning the impact of these events on Seminole County.

On the day that the Aldays were killed, news of the incident spread through the Seminole County community even before it was reported by any media. (T. Nov. Evid. Hrng. at 477). When members of the media arrived at the scene of the victims' home, a crowd of between 100-200 non-law enforcement persons had already gathered. (Id. at 507-09). News of the discovery of the bodies, the search for Mary Alday, and the search for and arrest of the suspects was widely publicized in all of the media -- newspapers, radio and television. (T. Nov. Evid. Hrng. at 178, 181-183, 199-200).

The Alday's funeral was attended by a huge crowd estimated by the press to be in excess of 2,000 persons, almost one-third of the county's population, and was attended by many state and local dignitaries, including Lillian Carter, the mother of then Governor Jimmy Carter. (T. Aug. Hrng. at 46, Nov. Hrng. at 222-23). Most stores in Donalsonville, at the request of the town's mayor, closed on the day of the funeral. (T. Aug. Hrng. at 51). Additionally, Father's day in Seminole County was declared "Alday Memorial Day". All churches in the county took up a collection that day for the "Alday Memorial Fund" to be used for a new sanctuary for the Spring Creek Baptist Church.

After the arrest of Respondent and the co-indictees, the allegations were widely reported in the community that Respondent was a prison escapee from Maryland and that he was a suspect in several other crimes in other states. (T. Nov. Hrng. at 530-31). None of these widely reported allegations were ever introduced as evidence at his trial.

Equally, if not more significant than the media coverage, was the word of mouth dissemination of all information (and all rumors) throughout this small county. In the words of Thelma Harrington, a lifetime resident of Seminole county and a juror at the Dungee trial, word of news about the Alday case "spread like fire in broom sage" in Seminole County. (T. Nov. Hrng. at 176). In her words, people in the community would "have had lockjaw not to [talk]" of the incident; everyone was "so excited and upset". (Id. at 186). According to long time residents of Seminole County, this was the biggest event ever in the county. (Id. at 181, 201, 482).

People in Seminole County were willing to freely express their opinions on the case to members of the media. The only opinion heard was that Respondent and his co-indictees were guilty, and more importantly, that the only possible punishment for whomever was guilty was death. No contrary opinion was heard. (T. Nov. Hrng. 513-16, 479, 485-86, T. Aug. Hrng. at 46-47). As eloquently expressed by lifetime Seminole County resident Thelma Harrington, who sat on the Dungee jury, the unanimous sentiment of the community, pre-trial, concerning Respondent and his co-indictees was: "fry 'em, electrocute 'em", "that's all I heard", "everybody knew they did it [committed the murders]". (T. Nov. Hrng. at 187, 197). Citizens in the community were heard to express the opinion that it was too bad that there even had to be a trial before the execution could take place. (T. Nov. Hrng. at 515). It was even jokingly suggested that the suspects be released on bond in order that the execution could be accomplished outside of the formal legal process. (Id. at 516).

Shortly after the arrest of Respondent and his co-indictees, Bud Alday, a family member of the victims, privately retained Peter Zack Geer to prosecute the case. Mr. Geer, a former Lieutenant Governor of Georgia from the southwestern section of the State,[5] and had previously represented the

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5. He carried both Southwestern Georgia generally, and Seminole County specifically, in his two previous races for statewide office. (Id. at 72).

Aldays in a civil matter. (T. Nov. Hrng. at 73). Geer was paid a fee in the range of $5,000.00 to prosecute Respondent and his co-indictees. (Id. at 74).

This privately employed prosecutor, Peter Zack Geer, was the nephew of the trial judge, Walter I. Geer. (T. Nov. Hrg. 975-76). At the time he was retained by the Alday family to prosecute the case, Peter Zack Geer knew, as did the Alday family, that his uncle would be the judge.[6] (Id. at 82). The Alday family also retained a second private attorney, a good friend of the Alday family, Alto Lee, to assist in the prosecution. (Id. at 51, 56).

The prosecution of Respondent, Wayne Carl Coleman, was conducted from start to finish by the private prosecutor, the nephew of the trial judge, Peter Zack Geer. He "called the case", conducted the Preliminary Hearing, (Id. at 95), and argued the State's opposition to the motion for change of venue. At trial, Geer conducted the State's individual questioning of the jurors on voir dire examination and he exercised the State's peremptory challenges. He made the State's opening statement, examined the State's key witness, Billy Isaacs, and all other state witnesses, save one, and made the closing argument on the guilt/innocence and the closing argument at the penalty phase.

Furthermore, the plea bargain involving Billy Isaacs was arranged by Geer. The members of the media perceived him to be in charge of the prosecution and went to him for any comments from the State. (T. Nov. Hrng. at 523; Aug. Hrng. at 74-75). Whenever defense counsel needed to confer with counsel for the State, they would confer with either Geer or the other privately retained prosecutor, Alto Lee. (T. Farrington Dep. at

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6. Judge Geer refused to recuse himself even though Georgia law requires that a judge not sit in a case in which he is related to any party in interest within the sixth degree of consanguinity. Ga. Code Ann. 24-102; see also, Ga. Code of Judicial Conduct, Canon 3, C(1)(d)(ii), 231 Ga. A-5, A-6. The Judge's refusal to step down was also widely reported in the media, see e.g., Albany Herald article from September 27 titled, "Judge Won't Step Down in Alday Stayings Trial". This Court recently held that a judge's refusal to recuse himself was an error of constitutional magnitude. Aetna Life Insurance Co. v. Lavoie, ___ U.S. ___, 54 U.S.L.W. 4381 (April 22, 1986).

33-34). The District Attorney, Mr. Ralph Foster, had no role whatsoever in the prosecution of the case. (Id.)

After the arrest of Respondent and his co-indictees in West Virginia, they were extradited to Georgia. Rather than being held in Seminole County, they were held in the Randolph County Jail. The defendants were told by the sheriff there that they were being held there for their safety. (T. Nov. Hrng. at 157). When the four were brought to Seminole County for their first appearance, a large group of citizens gathered outside the courthouse. The transporting officers commented that they had to take the utmost precaution to secure the suspects' safety because of the crowd.[7] (T. Nov. Hrng. at 124, 126, 129). Security at the courthouse was extremely tight. Bill Montgomery, a journalist with over twenty years of experience, testified that he had never seen that level of security in a small county. (T. Aug. Hrng. at 58). Thelma Harrington, a lifetime resident of Seminole County, described the security as tight in order "to keep down violence." (T. Nov. Hrng. 191).

Prior to the trials of the co-indictees, Billy Isaacs, one of the co-indictees, agreed to testify for the State in exchange for a favorable plea bargain. At that point, he noted a distinct change in the community's attitude towards him. After he agreed to testify for the State, people in the community began to send him gifts such as paint sets, fruit, candy, etc. (T. Nov. Hrng. at 130-31).

The trials of the remaining co-indictees were held during three consecutive weeks in January, 1974. Carl Isaacs was tried first, beginning on January 1; George Dungee's trial began on January 7. It was not until after Isaacs and Dungee were convicted and sentenced to death that Respondent Coleman's trial began. All three trials were held in Seminole County.

The trials were conducted in a packed courtroom amid extremely tight security. The Alday family sat on the front row in full view of the jury.

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7. Sheriff White of Seminole County stated: "[t]here's no doubt in my mind that lynching has crossed the mind of everybody."

Mrs. Lillian Carter, the mother of then Governor Jimmy Carter, sat with the Alday family. (T. Nov. Hrg. at 522; T. Farrington Depos. at 11).

All the evidence, testimony, etc. from the Isaacs and Dungee trials were widely reported in Seminole County, including the testimony of Billy Isaacs during which he graphically described the murders. The Isaacs and Dungee verdicts of guilt and sentences of death were known to virtually everyone in the Seminole County community prior to Wayne Carl Coleman's trial; everyone was discussing them and the word spread like "chaff in the wind". Community sentiment was strongly in favor of the guilty verdicts and death sentences imposed. (T. Nov. Hrng. at 193-95; 491; 523-24). Furthermore, the fact that relatives of the victims were extremely pleased with the sentences of death imposed upon Isaacs and Dungee was also widely publicized prior to Respondent's trial. One article in the Atlanta Constitution, headlined "Alday Family Hoped for Death Penalty, Speak Their Feelings", concluded by noting that the wife of one of the Alday victims smiled broadly "after the death penalty was returned for Isaacs". Another noted that relatives of the victims appeared pleased and relieved when the death sentence was announced. All members of Respondent's petit jury knew that Isaacs and Dungee had been found guilty and sentenced to death.

One of the jurors who sat on Wayne Carl Coleman's trial jury was Joseph Bird. A summons for jury service intended for Joe E. Byrd was delivered to Joseph Bird. Although Mr. Bird informed the serving officer that he was not the person named on the summons, he was told to come to court anyway. (T. Nov. Hrng. at 5-7). Both prior to and during Wayne Carl Coleman's trial, Joseph Bird was dating Marilyn Alday, a relative of the victims in this case. He had been dating Ms. Alday since she was thirteen years old; they are now married. (T. Nov. Hrng. at 26, 34-35). Prior to trial, Joseph Bird and Marilyn Alday had talked about the case several times. (Id. at 27). At his voir dire examination, Joseph Bird acted as if he barely knew the Aldays and did not reveal that he was dating Marilyn Alday.

Other facts will be developed as they relate to Respondent's argument.

REASONS THE WRIT SHOULD NOT BE GRANTED

I.

THE WRIT SHOULD NOT BE GRANTED BECAUSE THE ELEVENTH CIRCUIT CORRECTLY DECIDED THAT UNDER THE REMARKABLE FACTS IN THIS CASE RESPONDENT WAS ENTITLED TO A NEW TRIAL DUE TO THE OVERWHELMING EVIDENCE IN THE RECORD THAT EXTENSIVE AND PREJUDICIAL PUBLICITY PREDISPOSED THE COMMUNITY TO BELIEVE NOT ONLY THAT RESPONDENT WAS GUILTY BUT MUCH MORE SIGNIFICANTLY THAT THE DEATH PENALTY WAS THE ONLY ACCEPTABLE PUNISHMENT.

A. The Court of Appeals' Opinion

The Court of Appeals' application of the presumed prejudice standard can only be fairly described as extremely cautious, recognizing that the burden placed upon a habeas corpus petitioner "to show that pretrial publicity deprived him of his right to a fair trial before an impartial jury is an extremely heavy one", Coleman v. Kemp, supra, 778 F.2d at 1537. The Court of Appeals went on to say:

> Indeed, this case is a close case only because of the extremely high standard that must be met. If there were no constitutional right to a change of venue in the instant case, then one can conceive of virtually no case in which a change of venue would be a constitutional necessity. 778 F.2d at 1538.

A review of the record makes plain that the Eleventh Circuit was not engaging in hyperbole when it made the above statement. The "totality of the circumstances"[8] surrounding Respondent's trial allow no other result.

The publicity regarding Respondent's trial saturated this small community. This publicity did not simply consist of neutrally detailing the facts of the crime (horrible in and of themselves) but rather characterized

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8. The panel emphasized that in examining the "totality of the circumstances", no single factor is dispositive. "Instead, we have weighed each element of the prejudicial publicity, taking into consideration the pervasiveness of the circulation thereof and how that publicity contributed to the totality of the circumstances." 778 F.2d at 1538.

the events and the defendant in a particularly hostile and negative manner[9] and raised other very prejudicial facts concerning Respondent never introduced at trial, e.g. that he had confessed to the murder of a Pennsylvania youth, that he was an escapee from a Maryland prison, were widely reported in the various media. Furthermore, in addition to these "facts", there were also statements from various members of the community, as well as editorials in several newspapers indicating not only that Respondent was guilty but also that the only appropriate sentence was death.[10]

As the Court of Appeals found: "[t]he clear picture that emerges from the publicity itself [is that] "the community was predisposed to both guilt and sentence . . ." 778 F.2d at 1539.

Furthermore, the Court of Appeals, in applying the presumed prejudice standard of Rideau v. Louisiana, 373 U.S. 723 (1963), was faithful to the presumption of correctness required by 28 U.S.C. 2254(d). The court, although specifically not deciding whether "presumed prejudice" was a mixed question of fact and law or a pure question of fact, did find that applying "any of the relevant legal standards, be it 'manifest error', 'fairly supported by the record', 'clearly erroneous', or independent review of a mixed question . . . under the extremely high Rideau standard . . . Coleman has met the standard." 778 F.2d at 1537-38.

The Court of Appeals recognized that the evidence of Respondent's, as well as his co-indictees', guilt was overwhelming. However, the panel also

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9. A brief review of the language used in the articles as well as descriptions of the defendants, will demonstrate Respondent's point.

10. The publicity concerning the appropriateness of the death penalty began ever. before Respondent was apprehended. The quite obvious point these editorials and articles were making was that whoever was guilty of the crimes should be executed. Counsel for the Petitioner conceded this point at oral argument in the Eleventh Circuit.

recognized that this was not dispositive because to "hold otherwise would mean an obviously guilty defendant would have no right to a fair trial before an impartial jury." 778 F.2d at 1541. The court also recognized the anamoly of considering the strength of the evidence as to the penalty phase of Respondent's trial, since the jury, pursuant to Georgia's death penalty statute, has the absolute discretion to recommend mercy. 778 F.2d at 1549.

Finally, the panel extensively discussed the voir dire record in this case. The court assumed that a voir dire record could rebut a finding of presumed prejudice. 778 F.2d at 1541. Then the panel reviewed the record in detail, finding that the voir dire did not rebut the presumption of prejudice because: (i) the jurors were examined in each others' presence; (ii) the questions asked were inadequate to discover prejudice; and, (iii) despite the first two problems, thirty-eight of seventy-seven members of Respondent's venire were still excused for cause for having a fixed opinion regarding the case.[11] 778 F.2d at 1542-43.

In sum, the Court of Appeals carefully reviewed the evidence and reached the only conclusion compatible with the constitutional requirements of a fair trial in a fair tribunal. Finally, Respondent would note that the panel granted relief reluctantly. In unusual language which Respondent's counsel have not found in prior decisions from the Eleventh Circuit (or any court), the panel stated:

> No one familiar with the facts of this case and the overwhelming evidence of guilt could fail to have sympathy for the prolonged suffering of the families of these victims. The fatal error of trying this case in Seminole County was not their decision. Similarly, the unwarranted delay in the final disposition of this matter is not their fault. 788 F.2d at 1543, n. 27.

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11. An interesting sideline to this is that one potential juror, whom the trial judge refused to excuse for cause, had known the victims for approximately nine years, attended the funerals, read newspaper accounts of the murders and the first two trials and testified as a witness for the State in the two previous trials of Respondent's co-indictees.

B. The overwhelming evidence of the extensive and inflammatory publicity surrounding Respondent's trial leaves no other conclusion than that if the Respondent is not entitled to relief then there is no federal habeas corpus remedy for the denial of a criminal defendant's motion for a change of venue.

It is axiomatic that a defendant, in a criminal prosecution, is entitled to a change of venue when it is shown that actual prejudice invaded the jury box, Irvin v. Dowd, 366 U.S. 717 (1963), or that the atmosphere in which the trial was conducted was inherently prejudicial, Rideau v. Louisiana, 373 U.S. 723 (1963); Sheppard v. Maxwell, 384 U.S. 333 (1966). If a defendant can demonstrate that the atmosphere in the community is inherently prejudicial, it is unnecessary to prove that actual prejudice invaded the jury box. The facts of Respondent's case, however, demonstrate both an inherently prejudicial atmosphere and that prejudice did indeed invade the jury box.

It is significant that this is a capital case. The Georgia capital sentencing scheme requires that the jury decide not only the guilt or innocence of the accused but also whether the penalty will be a sentence of death or life imprisonment. See generally, Gregg v. Georgia, 428 U.S. 153 (1976). Pursuant to this Court's precedent, the sentencing determination must be made based upon both the nature of the offense committed and any mitigating aspect of the offense or the background and character of the defendant. Lockett v. Ohio, 438 U.S. 586 (1978).

Long before Respondent Coleman's trial, the residents of Seminole County had determined that the only appropriate punishment for the person(s) convicted of the Alday murders was death.[12] Every witness who answered this question, both media representatives and Seminole County

12. One of the first articles in the Donalsonville News discussing the apprehension of the four suspects also carried an article on the same page (the front page) regarding the new death penalty listing the statutory aggravating circumstances. The cases were also widely reported as a "test" case for the new statute due to this Court' holding in Furman v. Georgia, 408 U.S. 238 (1972). Isaac's counsel was reported as saying that this was "exactly the kind of case" the legislature meant for the death penalty to be used in.

residents, testified that the community sentiment was unanimously in favor of the death penalty for anyone convicted of the Alday deaths. Local editorials made this point clearly.

The May 24 edition of the Donalsonville News carried an article which stated, in pertinent part,

> There is a wide difference in the question of whether the people here could give the suspects a fair trial, and in our wanting to see the guilty ones punished and removed. . . . .

The same edition carried another editorial which stated:

> There is just no place in society for the kind of individuals who place no value on the life of any other individual. . . .
>
> We kill rattlesnakes because they kill anything they come in contact with. We likewise shoot mad dogs or other rabid animals.
>
> When individuals become as low as these lower animals, they lose their right to human treatment.

Another editorial, from the May 17 edition of the Bainbridge Post Searchlight, entitled "Corner the Mad Dog" stated:

> In the editorial parlance of early American newspapers, it was not uncommon for the editor to suggest that the perpetrator of a heinous crime 'should be shot down like a dirty dog.'
>
> We never liked that particular phrase, because even the meanest dogs we have ever known would in no way compare with the guilty person or persons who committed the violent, outrageous, atrocious, vicious, and beastly murders of six members of the Alday family in Seminole County sometime last Monday night.
>
> To make such a comparison would be speaking disparagingly of dogs in general, and they are more entitled to consideration than the maniac or maniacs who snuffed out the lives of six human beings, five men and one woman during the course of the evening and in addition, criminally assaulted the woman before she was killed. At least, the record shows she was criminally assaulted either before or after death.
>
> Fellow citizens, this is not Chicago or Hell's Kitchen. This happened in South Georgia. Even the Mafia would refrain from the magnitude of such a crime.
>
> A sex maniac is running free in our area. A mad dog is on the "loose".
>
> We are staunch believers in law and order, and we believe those who commit capital felonies should be brought before the bar of justice, but this is one case where we hope the guilty will resist arrest, and will be felled where they are cornered.

> We must find this criminal or criminals if we have to track them to the four corners of the world. We must bring the ghoul or ghouls to bay and the guilty must be removed from our society just as a dog with rabies is removed. Permanently.

Another editorial from the same paper was entitled, "A Case for Capital Punishment". It stated:

> It is remarkable how anyone could be aware of the atrocities such as the Alday murders and still contend that capital punishment is too harsh, that is has no place in modern society, or that it is not an effective deterrent to criminals.

The May 31 edition of the Donalsonville News contained the following editorial, which stated in pertinent part:

> The brutal, senseless murders of six members of the Alday family should serve as another warning to all society that there is a need for capital punishment in this country. How can anyone who is aware of this heinous crime, still maintain that capital punishment is too harsh and should be stricken from our society for all time?
>
> The Alday case is a perfect case for capital punishment. It shows all too well our system of today with dealing with criminals is not working. Three of the persons charged with the execution style killings, escaped from a prison that was preparing them for life on the outside. They were to be released soon back into society. It seems clear that there are some criminals that just cannot be rehabilitated and should not be returned to society to destroy the lives of innocent, hard-working people like the Aldays.
>
> * * * * * *
>
> Those who oppose capital punishment argue that it is not a deterrent to brutal crimes. But it has been so long since we had an execution in Georgia that there is [sic] really no current statistics for an accurate evaluation. On the other hand, brutal crimes have climbed out of sight in the past several years and that ought to tell the "do-gooders" something about capital punishment.
>
> Look at it this way. When a person is convicted by the courts beyond a reasonable doubt of a crime like the slaughter of the Alday family, it seems to me there is nothing else society can do. It is absurd to accept the argument that such a criminal can be made to see the error of his ways. As long as such a criminal lives, he is indeed a threat to society. If he is put into prison, he has the opportunity for escape or parole. If he is executed, society has nothing more to fear from such a criminal.

As Thelma Harrington, a lifetime resident of Seminole County, who sat on co-indictee Dungee's jury said: everyone's opinion of the appropriate punishment was to "Fry 'em; electrocute 'em". The Clerk of Court of Seminole County, the most hostile witness to Respondent imaginable, testified that at least by the end of the Isaacs trial, he had determined that Wayne Carl Coleman should receive the death penalty. (T. Nov. Hrng. at 232). The Sheriff of Seminole County made the statement, widely reported in the media, that the death penalty was not enough punishment for Respondent and his co-indictees. According to then Sheriff White:

> If I had my way about it, I'd have me a large oven and I'd precook them for several days, just keep them alive and let them punish . . . . And I don't think that would satisfy me.
>
> I don't see where they could put up any plea for mercy . . . . The acts of these men are lower than animals.
>
> If a citizen gets out of hand and starts shooting people up, there's only one way to arrest and that's with a shotgun.
>
> Any man that believes in God believes in capital punishment . . . . I could throw the switch to the electric chair and never lose a minute's sleep.

Not one witness was presented at the evidentiary hearing to contradict the evidence that the community in which Respondent was convicted and sentenced to death had prejudged punishment in this case and had determined before his trial that death was the only acceptable punishment. Even Respondent's trial counsel underscored the community's sentiment. One of Wayne Coleman's appointed trial lawyers stated to the press: "this is the worst thing that's ever happened to me professionally. There is just no way I can get out of it. I pleaded with the judge. . . ." Other counsel were quoted as saying that "they planned to provide the best courtroom defense, but with reluctance." At the penalty phase of Coleman's trial, counsel told the jury at closing argument that the judge had appointed him against his

wishes.[13]

Respondent was further disadvantaged by the fact that he was tried third. Before his trial, the media had widely reported in Seminole County the details of the evidence presented at the Isaacs and Dungee trials and the verdicts and death sentences imposed at those trials. In fact, every juror in Coleman's case knew that his co-indictees had been convicted and had received the death penalty.

Seminole County was saturated by newspaper and magazine articles concerning this case. The newspaper articles concerning this case circulated in Seminole County accounted for 209 stories, consuming some 4,858 column inches. (T. Nov. Hrng. at 412). The testimony presented at the evidentiary hearing indicated that radio and television coverage was just as extensive. The transcript of the Georgia Network News broadcasts showed 33 days of broadcasts concerning this case which continued from the day of the commission of the offense until the completion of the trials. There is reason to believe that the coverage by the other electronic media was equally extensive. The Court of Appeals exhaustively discussed the articles, etc., regarding the Alday killings. A good deal of the material was factual. However, a significant percentage was not and either presented the defendants and/or the facts in an inflammatory manner or discussed prejudicial facts generally involving other crimes commited by Respondent and his co-indictees never introduced at Respondent's trial.

The extensive media publicity was only the springboard to more extensive word of mouth publicity concerning this case. As the testimony at the evidentiary hearing demonstrated, Seminole County is a small, tightly knit

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13. One attorney, J. Willis Conger, stated:

> I'd like very much to be relieved. I don't know of any lawyer in Georgia who would want the case. I don't know of anybody who wants it.
>
> I feel the feeling in Seminole County and this part of Georgia is such that I don't want it . It is not the kind of case I want to get involved in.

community in which word of mouth is virtually as important as the formal media in spreading prejudicial publicity concerning this case.

The effect of the publicity[14] is most easily demonstrated by reviewing Respondent's venire and petit jury. Approximately fifty percent (50%) or 38 out of 77 venirepersons drawn for Coleman's trial were dismissed for having fixed opinions as to the guilt of the accused. Given the sentiment of the community, there is every reason to believe that there was an attempt on the part of prospective jurors to attempt to be placed on the jury so that they could avenge the members of the Alday family. As strong as this may sound, an example will demonstrate Respondent's point. Mrs. Robert Hines, a prospective juror, denied having a fixed opinion. Mrs. Hines testified on voir dire that she had known the victims for 8 or 9 years, attended the funeral, read the newspapers, heard the news and testified as a witness for the State in the two previous trials of Respondent's co-indictees. She stated, however, that she had not been influenced by what she had heard and that she could give the defendant a fair trial. (Trial Tr. Vol. V, p. 478-479). The Respondent's challenge to this juror for cause was overruled. (Trial Tr. Vol. VI, p. 482).

The twelve jurors' level of awareness and concern about the killings was indicative of the effect the extensive publicity surrounding Respondent's trial. Justice Hill, in his dissent from the majority opinion affirming Respondent's convictions and sentences on direct appeal to the Georgia Supreme Court, recognized the disposition of the jurors when he stated:

> On voir dire, the twelve jurors who served testified as follows:
> Juror No. 1 testified that he knew the victims when he saw them. Although he did not go to the funeral, two days after their deaths he went by the trailer to pay his respects. He knew the two other cases were tried and their outcome and had discussed

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14. To underscore the point, it is Respondent's position that the effect of the inflammatory and extensive publicity was enhanced in this case by the prominence of the victims and the inherent nature of a small rural isolated locality such as Seminole County. If this were not enough in and of itself, the additional fact that the victim retained a special prosecutor, a former lieutenant governor of Georgia, who was very popular in Southwest Georgia, as well as the nephew of the trial judge, gave Respondent no chance at a fair trial.

those trials. He had read a lot about the cases in the newspapers and had seen and heard about the homicides on television and radio. The things he had heard did not make him think the defendant was probably guilty.

Juror No. 2 (later selected as foreman) testified that he had known the victims for eight years and had worked with two of them. They had never visited in his home nor he in theirs and he did not attend the funeral. He knew that two other defendants had been tried and both were found guilty but he had not discussed it with anyone. He had read newspaper articles and heard on television and radio about the crimes. Although the news he had read and heard pointed to defendant's guilt, the reports did not sway him one way or the other.

Juror No. 3 did not know the Aldays. He did know of the prior trials and convictions and he knew that this defendant was the fourth man. Although he had read about he case in the newspaper, he had seen it on television only once or twice. Although the publicity indicated that the defendant was guilty, he felt he could be impartial.

Juror No. 4 lived five or six miles from the trailer and knew all the Aldays but did not attend the funeral. He had read and heard some news accounts and knew that two other cases had been tried and verdicts of guilty returned.

Juror No. 5 did not know the victims. He had read news reports and knew about the trials but was not swayed by them.

Juror No. 6 had met one of the victims five or six years earlier in connection with an insurance claim. He had read and heard news of the homicides and of the trials.

Juror No. 7 knew all of the Aldays except Mary and went to the funeral. He had seen newspaper and television accounts of the crimes and trials.

Jury No. 8 knew all of the Aldays that were killed except Mary but did not know them well enough to visit them and did not attend their funeral. She had read newspapers and knew the outcomes of the other trials.

Juror No. 9 did not know the Aldays. She kept up with the cases on television and by newspaper and had discussed the matter with a friend. She knew the outcome of the earlier trials.

Juror No. 10 knew the victims by sight and had seen newspaper and television accounts of the other trials. She also had read a magazine article about the matter. The information she had read was unfavorable to the defendant but she felt she could be impartial.

> Juror No. 11 did not know the victims personally. She has read in the paper about the cases and prior convictions. The information she had read was unfavorable to the defendant and she believed to some extent the things she had read but felt she could be impartial.
>
> Juror No. 12 knew the victims when he saw them but did not know them personally. He had read news reports of the homicides and knew there were two prior convictions. He had not discussed the case.
>
> In summary, four of the empaneled jurors thought that the publicity indicated that the defendant was guilty but felt that they could be impartial. Another juror attended the Alday funeral and another went to the trailer to pay his respects. A majority of the jurors knew one or more of the victims. All twelve were aware of the outcome of the two earlier trials of co-defendants. [where both co-defendants were convicted and sentenced to death] Coleman v. State, 237 Ga. 84, 96-100, 226 S.E.2d 911 (1976).

As this Court stated in Irwin v. Dowd, supra: "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion." 366 U.S. at 728. Furthermore, to have Respondent's sentence decided in an atmosphere in which it had already been decided that the only appropriate acceptable punishment was death would contravene the Eighth Amendment's requirement that any sentence of death must be individualized. See Gregg v. Georgia, supra. In sum, a sentence imposed under such circumstances would be tantamount to a mandatory death penalty and therefore violate this Court's holding in Woodson v. North Carolina, 428 U.S. 280 (1976). Considering the small size of Seminole County, the overwhelming level of prejudicial publicity, the status of the Alday family in the community and the prejudice invading the jury box itself, if the Respondent is not entitled to habeas corpus relief due to the denial of his motion for a change of venue, then it can be safely said that there is no recourse in the federal courts for such violations occurring in state criminal proceedings. As the Court of Appeals recognized,

it is hard to conceive of a stronger case.

Finally, the Respondent takes issue with the Attorney General's contention that the Court of Appeals did not give proper deference to state court findings of fact as required by 28 U.S.C. 2254(d). First, this Court has never held that the presumption of correctness applies to a state court findings regarding presumed prejudice. It would seem at the very least to be a mixed question of law and fact.[15] Cf. Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844 (1985). The Attorney General's brief in the Eleventh Circuit conceded that the issue was a mixed question of law and fact. See State's Supplemental Brief at 17. However, the court below did not expressly resolve the issue because it determined that even assuming that presumed prejudice was a question of fact, the state court findings were not entitled to the presumption. 778 F.2d at 1537. The panel reached this conclusion for two reasons. First, it did not believe that material facts as found by the state courts were adequately developed at the state court hearing. 778 F.2d at 1537, n.18. Second, the facts as found were not fairly supported by the record. 778 F.2d at 1537. Either one of these reasons is a legitimate reason pursuant to 2254(d), for a federal court not to defer to state court findings of fact. 28 U.S.C. 2254(a)(3) & (8); see also Sumner v. Matta, 455 U.S. 591 (1982) (Sumner (II).

In Sumner this Court stated:

> Of course, the federal courts are not necessarily bound by the state court's findings. Section 2254(d) permits a federal court to conclude, for example, that a state finding was 'not fairly supported by the record.' But the statute does require the federal courts to face up to any disagreement as to the facts and to defer to the state court unless one of the factors is found. 455 U.S. at 597-98.

The Court of Appeals "faced up" to its task with all, and possibly more, deference than is statutorily required in Respondent's case. The remarkable thing is that Respondent's case has proceeded so far through our system of justice before some tribunal did.

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15. The Eleventh Circuit has previously treated it as a mixed question of law and fact. See, e.g. United States v. Capo, 596 F.2d 1086, 1090 (5th Cir. 1979), cert. denied, 444 U.S. 1019 (1980).

CONCLUSION

The Respondent, Wayne Carl Coleman, submits that for all the reasons stated above, the Eleventh Circuit correctly decided that he was entitled to a new trial and sentencing hearing in conformity with the requirements of the Eighth and Fourteenth Amendments. Therefore, Respondent requests that certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage annexed thereto addressed to Ms. Susan Boleyn, Assistant Attorney General, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 5th day of May, 1986.

Millard Farmer

85-1652

FILING STATEMENT

I hereby certify that on May 7, 1986, within the time period permitted by the Supreme Court Rules I personally deposited this Brief in Opposition to Petition For a Writ of Certiorari in the United States Mail with correct First Class Postage prepaid in conformity with Supreme Court Rule 28.2.

This 7th day of May, 1986.

James C. Bonner, Jr.
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NOTARY PUBLIC